Supreme Court of the United States

STATES MARINE CORPORATION,
Petitioner,

against

YNGVAR AABY, HELGA LYCHE,
ERLING AABY and E. B. AABY'S
REDERI AKTIESELSKABET,
Libelants-Respondents.

BRIEF FOR PETITIONER.

STATEMENT.

When the time charter of the *Tento* was made on August 10, 1937, the vessel was in Australia and was described in the charter, line 17, "expected ready November." She left Queenstown in the middle of September, 1937, and had substantial trouble with her machinery on the voyage. The master, Knudtson, says, 591:

> "We had some trouble with one of the main engines, the tote-wheel for driving the shaft having broken down * * * some 700 miles off Dakar."

The vessel put into Dakar, Africa, under one engine, *Hertzberg,* 188, 190, and remained there from November 8 to November 16. *Kvernes,* 129. Being unable to make complete repairs, the vessel proceeded, still under one engine to Teneriffe where a new cog wheel was obtained. *Hertzberg,* 190. The vessel then went to Antwerp where people came on board from

Sandefjord and Rotterdam and Oslo to make estimates for repairs. *Kvernes,* 145; *Hertzberg,* 191. Apparently the works at Sandefjord were the only ones which offered to make the repairs by December 31, at 4 p. m., the canceling date. *Aaby,* 449.

The vessel went to Sandefjord where extensive repairs were carried on from December 15 to 31. *Kvernes,* 126. The repairs involved the main engines, port and starboard, water and lubricating oil cooling system, fuel pumps, compressor, propeller shafts, sea valves, auxiliary engines 1 and 2, and various other features detailed in the bill. *Libelants' Ex.* 11, p. 78. The cost of the repairs was Kr. 107,831, *Hertzberg,* 161, 246, equivalent in our currency to about $26,957.

The repairs were considered a rush job, *Wegger,* 354, and were completed on 31 December, 1937, about 3 p. m. See deck log, *Ex. A,* 606, *Knudtzon,* 552. According to *Ex.* 1, *Wegger,* 354, giving a list of the men "employed each day on board and ashore with the repair of the M/S *Tento*", 382 men were working on December 30, and 99 on December 31. P. 121.

While the repairs were continuing, and on 29 December, the owners telegraphed to charterers, 803:

> "*Tento* OWNERS GIVE NOTICE READY FOR DELIVERY SANDEFJORD FRIDAY 31 DECEMBER TWELVE NOON * * *".

When the repair yard completed the work, the customary trial trip at sea was not made, *Aaby,* 455, although the specifications by owners' consulting engineer, Coch, in November, 1937, *Aaby,* 455-6, contained the provisions:

> "Item 21. After completion of repairs, the main motors and all auxiliary machinery to be

> tried at the moorings and possible faults to be put right and all adjusted for quiet and proper run.
>
> "Thereafter running a trial trip at sea with the ship where all the machinery shall work properly for their full duty * * *." 474.

A trial trip would have required about eight hours, *Bagger,* 1112, and obviously would have prevented the owners from making any tender of delivery before the canceling date 4 p. m. on 31 December. If the trial trip had been made, the shaft of the lubricating oil pump would have been found to be in a broken condition at the canceling date, as the shaft actually broke after being in use less than an hour after leaving the repair yard and 20 to 30 minutes after the vessel was tendered by the owners to the time charterers.

Thus the owners by neglecting to have a trial trip avoided the customary and specified test which would have disclosed the unseaworthy condition of the vessel.

In reply to the owners' notice of December 29 that the vessel would be ready on December 31, *fol.* 803, charterer's agents in London, on 30 December, cabled to broker at Oslo:

> "TAKE DELIVERY IF TENDERED BEFORE CANCELLING TIME VESSEL PROCEEDS TOWARDS SAINT JOHNS N. B." *fol.* 1296.

When the repairs were completed on 31 December, the log contains the entry, 1359, that the starboard motor was put slow ahead at 15.10. This was 3.10 p. m. At 3.30 p. m. the master tendered delivery of the vessel under the charter in the harbor of Sandefjord. Johan Elligers, who had been instructed by charterer to take delivery, had gone on the vessel from Sandefjord and

signed a delivery certificate to the effect that no defects were found at the time of delivery. 42. Elligers said that he walked around the ship with the captain, 975, and "I surveyed the holds and the deck but not the engine room." See also 892. He said, *fol.* 976:

> "I did not make any examination of the engines or machinery of the *Tento.* * * * I did not make any examination of the lubricating oil pump auxiliary motor No. 1."

The vessel proceeded about 8 or 9 miles in very good weather and in the closed water of Sandefjord. *Kvernes,* 137. Then she broke down. The rough engine log, *Exs.* F. and G., 1359, contains the entry:

> "Aux. Motor I stop 16.20 because of fault with lubricating oil pump and engine running warm."

It was found that the shaft of the lubricating oil pump was broken. The engineer of the vessel said he thought the fracture occurred "20 minutes to a half hour" before he discovered it. 188. That would put the breakdown about 3.50 to 4 o'clock and 20 minutes to 30 minutes after the tender of delivery had been made.

Thus, at the canceling time of four o'clock December 31 charter Clause 14, and perhaps for 10 minutes previously, the vessel was in a broken down condition and notice of vessel's readiness could not have been given.

In view of the concurrent findings of both courts that the vessel was unseaworthy at the time of delivery, there never could have been any compliance by the owner with the requirement of the charter that "should

vessel not have given written notice of readiness on or before December 31, 1937, but not later than 4 p. m. charterers or their agents to have the option of canceling this charter at any time not later than the day of vessel's readiness." The vessel was not ready at any time on 31 December.

The shaft that broke was a piece of steel about 9 to 10 inches long and about 1½ inches in diameter, according to Hertzberg, the chief engineer, 165. He did not observe any defect in the metal and could not give any explanation as to why the shaft broke. 182. He said it was not possible for him to make a permanent repair of the shaft. 179.

While the Court of Appeals says, p. 491, that the vessel stopped "apparently not because the breaking of the shaft made her unnavigable, but to determine the extent of the damage", the Chief Officer, Kvernes, said, 135, that after she broke down she was not able to make any headway and just drifted,

> "We was drifting during that time and we anchored at 7 p. m." fol. 136.

He had previously said, 102, "she was drifting up to about 7 o'clock." The master says that after they stopped:

> "We then found that we were unable to start again."
>
> "She drifted for about two hours until she dropped anchor about 7 p. m." fols. 582, 583.

The log, *Ex. A,* contains the entry, 607:

> "the ship drifted down towards the reefs."

According to the master, she was then in "a dangerous place because there was no shelter and there

was a gale with snow coming up." 583. The log entry, January 1, 1938, says, 608:

> "As the ship was lying in a dangerous and very exposed position, the tug *David* of Sandefjord was ordered to assist the ship into Siggrunnden as a port of refuge. * * * At 18.30 hove anchor and the tug *David* towed the ship to a safer anchorage. At 21.05 anchored on the Siggrunnden at Sandefjord."

This does not support the statement of the Court of Appeals that the breakdown did not make the ship unnavigable.

On January 1, Yggeseth, Assistant Yard Superintendent of Framnaes, at Sandefjord learned of the breakage and took a tug to the *Tento* to find out just what breakage had been done and then went back to Sandefjord and returned with six or seven men to the *Tento.* The shaft and propellers of the pump were taken to the workshop and after the repair was finished on January 2, the shaft and the propellers were taken to the *Tento* and installed. 318. The vessel sailed on 3 January, *Kvernes,* 104, on orders given on 30 December. 836, 691, *Resp. Ex.* 1, 1396.

The broken shaft was not preserved, but was scrapped. *Wegger,* 346; *Aaby,* 420. Neither Yggeseth, the Yard Superintendent nor Wegger, the Managing Director of the repair yard, examined the broken shaft. *Wegger,* 345. Yggeseth said, 321:

> "I did not personally examine the broken shaft but left that job to the foreman."

The foreman was not examined.

No tests were made to determine the cause of the breakdown. *Kvernes,* 588.

No explanation was ever furnished by the libelants about the cause of the breakdown until at the trial, their witness, Ford, said "that the most likely appearing cause would be a defect in the metal of the shaft." He did not suggest a latent defect, although on his recall after respondent's experts had been examined, libelant's counsel referred to Ford's testimony as if it had used the term "latent defect". 1245. He never said that he thought the fracture was due to a latent defect, but merely that "there is no more evidence to indicate that a fatigue condition existed than there is that a latent defect existed." 1246.

There is not any exception in the charter of latent defect to qualify the warranty of seaworthiness and "thoroughly efficient state" and that the vessel on delivery should be "tight, staunch, strong and in every way fitted for the service."

Respondent's experts, Baruch, 1090, 1091, and Bagger, 1122, considered that the breakage was due to a crack which developed as a result of fatigue in the metal and that this crack should have been visible for a long time.

The District Court found it unnecessary to make any determination as to the cause of the breakage, but considered, fol. 1431; that

> "As between these divergent opinions it is not possible to make any determination. Nor is it necessary to do so, for the mere fact of the breakdown, so soon after the delivery of the vessel, raised a presumption of unseaworthiness at the time of the delivery. (*The Southwark*, 191 U. S. 1, 14; *Federal Forwarding Co.* v. *Lanassa* (C. C. A. 4), 32 F. (2d) 154), and this presumption has not been rebutted. Moreover,

> the warranty of seaworthiness is an absolute one, and does not depend upon the knowledge of the owner or the diligence of his efforts to provide a seaworthy vessel. (*The Southwark, supra; The Caledonia,* 157 U. S. 124; *Work* v. *Leathers,* 97 U. S. 379). I therefore find that the vessel was unseaworthy as to the lubricating oil pump at the time of the delivery of the vessel to the respondent."

The somewhat confused opinion of the Court of Appeals seems to have agreed with this view. It is said, p. 491:

> "It is true that, from the fact that the shaft broke almost immediately after the delivery of the vessel it could properly be inferred that it was defective at the time of delivery. *The Southwark,* 191 U. S. 1, 13-14; *Federal Forwarding Co.* v. *Lanasa,* 4 Cir., 32 F. 2d 154, 156-157; *The Nomad,* D. N. J. 3 F. Supp. 535; Scrutton on Charterparties and Bills of Lading (12th ed.) pp. 101-02. It is also true that the exercise of diligence to discover the defect or lack of knowledge of it is immaterial, the terms of the charter party or of a controlling statute not being to the contrary. *Work* v. *Leathers,* 97 U. S. 379; *The Caledonia,* 157 U. S. 124; *The Carib Prince,* 170 U. S. 655; *Federal Forwarding Co.* v. *Lanasa, supra.*"

The owners never claimed in their libel, nor at any stage of the proceedings before the District Court or before the Court of Appeals that the vessel was tendered to the charterers in a seaworthy condition, or that the owners had complied with their representation and warranty in the charter, line 5, that the ves-

sel was "with hull, machinery and equipment in a thoroughly efficient state" and that she should be on her delivery, lines 20, 21 "tight, staunch, strong and in every way fitted for the service."

Similarly, the owners have never suggested that they have complied with Clause 14 of the charter printed *supra,* p. 4 that written notice of readiness should be given not later than 4 p. m. on December 31 and otherwise charterers to have the option of canceling not later than the day of vessel's readiness.

The vessel was not ready on December 31 and the owners could not have given any notice of actual readiness at any time on that day, let alone 4 p. m., which was the canceling hour. The vessel certainly was not ready while she was immobilized waiting the repair of the shaft which was not completed until January 3. *Kvernes,* 104; *Log,* 295.

The charterer, on being advised by cable from Sandefjord that the vessel had returned to Sandefjord Friday night owing to breakdown of auxiliary motor, sent a cable on 3 January which was delivered to owners' agent at Oslo the same day. *Ex. P,* 489, *Aaby,* 423, as follows:

> "CHARTERERS SAY TENTO DELIBERATELY DELIVERED NOT PROPER CONDITION REFUSE ACCEPT SHIP CONSIDER CHARTERPARTY CANCELLED."

A cable of similar purport was sent the same day by Smith in London to owners' broker at Oslo. *Ex. P,* 491, *Aaby,* 423.

No notice of readiness was ever given on January 3, the first date when it could have been given.

DECISION OF THE DISTRICT COURT.

The conclusion of the District Court was that despite the breach of the warranty of seaworthiness and fitness and efficient state of the machinery, and despite complete breach by the owners of the requirements of Clause 14 of giving notice of readiness before 4 p. m. December 31, the owners had made a good delivery and the rights of the parties were thereafter determined by the provisions of the charter. The opinion of the District Court says, 1433:

> "It appears from the facts already found that the vessel was delivered to, and accepted by, the respondent prior to the canceling date, and thereupon started performance of the charter. The vessel was thus brought under the charter, and the rights of the parties are to be governed by its terms. Clause 15 provides:
>
> 'That in the event of loss of time from * * * breakdown or damages to * * * machinery * * * the payment of hire shall cease for the time thereby lost, * * *'.
>
> "Under the decisions, this clause furnishes the only measure of damage for lost time due to the specified contingencies."

The result of that decision is that if an owner after neglecting to ascertain the condition of his vessel by making the customary test tendered an unseaworthy vessel and the charterer accepted it when unaware of the unseaworthiness, he is bound to go on with the charter just as if a vessel complying with owner's warranty of unseaworthiness had been tendered.

Acceptance of a vessel by a charterer with knowledge of its unfitness is one thing. Where, however, a

charterer has no knowledge of the unfitness and the owner has neglected his duty and the means of ascertaining the unseaworthiness of the vessel, quite another situation is presented.

DECISION OF THE COURT OF APPEALS.

The decision of the Court of Appeals affirmed the decree below, but on a different ground and one not ever urged by the shipowners. The Court agreed, p. 491, that the shaft that broke was defective at the time of delivery and it was immaterial whether diligence had been used to discover the defect or whether there was knowledge of the defect. The view of the court seems to have been, p. 492, that the defective shaft at the time of delivery "does not mean that there was necessarily a breach of the undertaking expressed here as 'vessel on her delivery to be tight, staunch, strong and in every way fitted for the service * * *'. Such an undertaking seems to be equivalent to what is generally called a warranty of seaworthiness that is employed in all contracts concerning vessels in the absence of an express and unambiguous stipulation to the contrary." The opinion says further, p. 492:

> "The evidence tends to show that the breaking of the shaft was of little importance with respect to the operation of the vessel, though it is apparent that the defect was not remediable at sea or in a few minutes with the materials available on board."

This seems directly contrary to the evidence as indicated, *supra,* pp. 19, 20.

The Court then says, p. 492:

> "Authoritative support for the view that any breach of the undertaking of seaworthiness permits repudiation has, however, not been found."

Yet this statement is immediately refuted by the following paragraph of the opinion, p. 493:

> "The general American view is that a 'warranty' is a guaranty that a certain fact is true. See 4 Williston on Contracts §1075. Thus, when an owner 'warrants' that a certain situation exists, he promises that it does exist, and the obligation of the charterer is conditioned upon the existence of that situation. *Davison* v. *Von Lingen,* 113 U. S. 40.
>
> "By this definition, then, any breach of warranty permits rescission, as well as an action for damages."

The opinion then contains a discussion of warranty of seaworthiness which can only be described as thoroughly confused and depriving the warranty of any substantial effect unless, p. 495, "The breach of the owners' undertaking of seaworthiness is so substantial as to defeat or frustrate the commercial purpose of the charter." The Court then said, p. 495:

> "An insubstantial breach of it [the undertaking of seaworthiness] not going to defeat the object of the contract will not justify repudiation. This, it is true, may raise some speculative difficulties."

It was then said, p. 496:

> "Two and a half days delay in the course of a twelve months time charter can hardly be con-

> sidered so substantial as to frustrate the purpose of the charter and under this view, we need not deal with the contention of the owners that the charter having been entered upon, the breakdown clause or the clause excepting accidents to machinery controls, except to point out how such a contention appears to be inconsistent with the whole body of the law relating to seaworthiness. See *The Caledonia,* 157 U. S. 124; *The Carib Prince,* 170 U. S. 655."

Thus the Court throws overboard the ground on which the decision of the District Court was based and the only ground urged by the shipowner in either court.

The opinion does not mention a complete breach by the shipowner of the provisions of Clause 14 under which if written notice of readiness should not be given by 4 p. m. on December 31, the charterer had the option of canceling the charter "at any time not later than the day of vessel's readiness". Yet the charterer gave notice of cancellation on 3 January, the earliest date when owners could have given a notice of readiness.

In the result, the charterer has been held obligated to proceed with the charter, although unaware of the breach of the owners' warranty of seaworthiness and fitness of the vessel on tender.

This holding is in despite of the fact that the owners in the District Court stated in their reply brief, p. 9

> "When a vessel is tendered under a charter in unseaworthy condition, the charterer has a right to reject her. No one disputes that. * * *" p. 12. "The charterer has the undoubted right to reject the vessel for unseaworthiness on tender."

The concession was repeated by owners' counsel in their brief, p. 34, in the Court of Appeals.

The charterer has been deprived also of its contract right to cancel "at any time not later than the day of vessel's readiness" if notice of readiness should not be given on or before 4 p. m. December 31.

FIRST POINT.

THE WARRANTY OF SEAWORTHINESS WAS ABSOLUTE, MATERIAL AND WAS BROKEN. THE CHARTERER WAS ENTITLED TO DECLINE TO PROCEED WITH THE CHARTER.

The opinion of the Court of Appeals, p. 493, says:

> "The general American view is that a warranty is a guaranty that a certain fact is true. See 4 Williston on Contracts, §1075."

Section 1075 of Williston deals with charter parties and contains the following language:

> "If, however, statements of fact are made in the charter-party itself relating to the vessel or to some material matter connected with the voyage, they are called 'warranties'. The untruth of such a statement in a charter-party will justify a refusal to accept the vessel. For this reason in modern English terminology the shipowner's obligation is called a 'condition' rather than a 'warranty'. The older term 'warranty' which is still in general use in America is far better.
>
> "'Guaranty' and 'warranty,' 'guarantee' and 'warrant' are obviously the same words. To attach different legal effects to them surely would be unfortunate. When an owner guarantees or warrants that a situation exists or that

> his ship shall do something, a business man would properly understand not merely that he agreed to pay damages, but that the obligation of the charterer to perform the contract depended on the owner's making good the guaranty or warranty, that is, that it operates both as a promise and as a condition. * * * But in the United States the untruth of a statement material enough to be called a 'warranty' operates also as a condition which will excuse a refusal to accept a vessel."

Warranties are of different kinds. Sometimes, as in *Davison* v. *Von Lingen,* 1884, 113 U. S. 40, cited by the Court of Appeals, the warranty relates to the position of the vessel. In that case, this Court said, p. 49:

> "That the stipulation in the charter-party, that the vessel is 'now sailed, or about to sail, from Benizaf, with cargo, for Philadelphia,' is a warranty, or a condition precedent, is, we think, quite clear."

The statement was not true and this Court held that the charterer was entitled not only to decline to load the vessel but also was entitled to recover damages for the owner's breach of warranty.

The opinion of the Court of Appeals says further, p. 493:

> "Thus when an owner 'warrants' that a certain situation exists, he promises that it does exist and the obligation of the charterer is conditioned upon the existence of that situation. *Davison* v. *Von Lingen,* 113 U. S. 40. By this definition then, any breach of warranty permits rescission as well as an action for damages."

Here the warranty related to the physical condition of the vessel.

It is impossible to suggest any more material matter in a warranty in a charter party than that the vessel is seaworthy and "in a thoroughly efficient state", line 5 of charter, and "tight, staunch, strong and in every way fitted for the service", line 21 of the charter. The requirement that the vessel shall comply with such a warranty is necessarily the basis on which a charterer undertakes to use a vessel.

A time charterer has to make his own commitments with respect to cargo. If he does not ship his own cargo he has to contract with shippers. In either event, it is essential that a seaworthy vessel be provided for the carriage of the cargo. If such a vessel is provided at the outset and subsequently either meets with a mishap or becomes unseaworthy, the owner must restore the vessel to a condition of seaworthiness. If the time necessary to do that should be so extensive as compared with the period of the time charter as to frustrate the adventure, the charterer certainly would be relieved from dealing further with the vessel, except that there might be a further claim by the charterer against the shipowner.

Where, however, the vessel is in an unseaworthy condition when tendered at the beginning of the charter, the time charterer should not be obliged to accept her, but should be free to reject her because of breach of warranty. Such has been the law hitherto. The right of the charterer to reject the vessel under those circumstances has been conceded by the owners in their statements in their briefs in the District Court and in the Court of Appeal as indicated *supra,* p. 27.

Although the owners agreed that "No one disputes that" the charterer may reject the vessel under such circumstances, the Court of Appeals here has affirmed such a right without any authority being cited in its support and directly in conflict with long-settled law.

Thus it is said in Williston on Contracts §1080, on a breach of warranty in a charter,

> "But when once it has been determined to be material and, therefore, a warranty, any breach whatever is operative to entitle the injured party not only to sue for damages, but also to refuse to continue performance."

The formula invented by the Court of Appeals, p. 495, is that a rescission, or what it called a repudiation, by a charterer is permitted only where the owner's breach of warranty is so substantial as to frustrate the commercial purpose of the charter. This seems to be based on three English cases, *Tarrabochio* v. *Hickey, Tully* v. *Howling* and *Stanton* v. *Richardson,* which are mentioned in the petition, p. 8, and which certainly do not support the Court's formula. The Court also says, page 495:

> "There are no American cases to the contrary."

Yet an earlier decision by the same Court is directly contrary to its formula. In *Ronalds* v. *Leiter,* C. C. A. 2d, 1901, 109 Fed. 905, a yacht had been chartered in November to Leiter for two months from November 9. When the vessel was on the way to Tampico on December 20 there was a breakage of the starboard propeller shaft and the starboard propeller fell into the sea. The charterer abandoned the cruise and

brought suit for the damages sustained through the unseaworthiness of the yacht. The jury found the vessel to have been unseaworthy when chartered and awarded the charterer damages. The Court of Appeals said, Brown, J., page 907:

> "We are of opinion that the rule adopted by the court below was sufficiently favorable to the owner. The vessel being found unseaworthy, the jury were directed in accordance with the decision of the supreme court in Strong *v.* U. S., 154 U. S. 632, that the charterer might have abandoned the yacht on discovering this fact, without further liability to the owner."

The charterer was relieved from the obligation mentioned in the charter of returning the vessel to New York at the expiration of the charter. The case is direct authority that when the charterer discovered unseaworthiness which had existed when the vessel was tendered under the charter, he was entitled to decline to go on.

An English case directly in point and contrary to the statement in the opinion of the Court of Appeals, 1177, is *New York & Cuba Mail* v. *Eriksen,* 1922, 27 Com. Cas. 330. The situation is on all fours with the present case and is a holding that where a vessel is unseaworthy when tendered under a charter, the charterer is not obliged to take her. In that case, a charter provided that the vessel, after discharging her inward cargo, should proceed to certain ports to load. The vessel discharged her cargo by 4 p. m. on November 24. On November 25, she proceeded to her loading place, moored there at 3:45 p. m. and at 4 p. m. the master gave notice of readiness to

load. The cancelling hour was 6 p. m. The court said, page 332:

> "It is clear that when after discharging she started to move to No. 3 dock or to the mooring place in No. 3 dock, she began her service under the charter party and that the express condition of seaworthiness contained in Clause 2 came into operation."

When the notice of readiness was given, there were a number of boiler tubes which required renewing and there was no prospect of the work being completed for at least ten days. The charterers refused to load and cancelled the charter. Under a subsequent arrangement between the parties, loading began five days later on 30 November and was completed on 8 December. The dispute went to arbitration and the arbitrator held that the charterer was entitled to refuse to load. The court said, page 335, that the finding of the umpire was right in law. It was said, page 336:

> "In my judgment that clause means what it says, namely that when the ship proceeds to her loading berth she is to be tight, staunch and strong and in every way fitted for the intended voyage; that is to say she was to be so fit at the latest at 3.45 p. m. on November 25. There are not two conditions as to seaworthiness, one that applies during the loading and another that comes into operation when she sails. There is only one condition which applies when she starts on her chartered service. She is to be fit to commence her chartered enterprise, which consists of going to her loading berth, loading, sailing and unloading. * * * p. 337. In my judgment the umpire was right in law in coming to the conclusion that the charterers were entitled to refuse to load the ship."

Thus, in the foregoing case the vessel was considered to have been in service under the charter. Yet when the charterers ascertained that the express condition of seaworthiness, when she started on her chartered service, had not been fulfilled, they cancelled the charter. Clearly the doctrine of frustration of adventure did not enter into the case as, five days later, under a new arrangement between the same parties, at a lower rate of freight the vessel began to load cargo.

This decision seems to have been ignored by the Court for it is not mentioned in the opinion, perhaps because it could not be answered.

American law has hitherto conformed strictly to English law as stated in *New York & Cuba Mail* v. *Eriksen.* There seems to be much more reason to continue the conformity than to vary from it. As this Court stated in *The Eliza Lines,* 1905, 199 U.S. 119, 128:

> "Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree."

The opinion of the Court of Appeals in referring, p. 496, to "the whole body of the law relating to seaworthiness" referred to *The Caledonia,* 1895, 157 U. S. 124, and to *The Carib Prince,* 1898, 170 U. S. 655. *The Caledonia* quoted from *The Edwin I. Morrison,* 153 U. S. 199, 210, that the warranty of seaworthiness was absolute and did not depend on the owner's knowledge or ignorance, his care or negligence. Other cases might be mentioned.

American cases have never admitted that a warranty of seaworthiness is satisfied if the vessel is

almost seaworthy, or seaworthy in some respects, but not altogether. Yet the Court of Appeals says, p. 495:

> "We take it then that the undertaking of seaworthiness is to be treated like any other contractual undertaking not expressly made a condition precedent to a party's performance of his obligations."

This is a new principle of law advanced by the Court of Appeals, which is wholly irreconcilable with other statements in its opinion and decisions of the Supreme Court that the warranty of seaworthiness is absolute. It is the basis on which the owners and charterer contracted.

The suggestion in the opinion of the Court of Appeals, p. 492, that "not every defect needing repair or causing damage amounts to a breach of undertaking" may be true with respect to some undertakings, but it has not any bearing whatever on the question of warranty of seaworthiness by a shipowner in a time charter. It is not apparent why the Court should have referred to the three cases of *Middleton* v. *Ocean Dominion,* 1943, 137 F. 2d. 619, 622; *The Sandfield,* 1898, 92 Fed. 633 and *Hedley* v. *Pinkney,* 1894 A. C. 222.

In *Middleton* v. *Ocean Dominion,* a vessel stranded because a master, on sailing, had not paid attention to notices given to him and had not transferred the information in the notices to a chart. The court said, referring to *Standard Oil Co.* v. *Clan Line,* 1924 A. C. 100:

> "The fault was plainly that of the owner, while here the master was supplied with everything necessary for navigation and only his neglect caused the accident."

This fault of the master did not render the vessel unseaworthy.

In *The Sandfield,* a cargo of sugar had been damaged by seawater which entered the hold by leakage around a rivet which became loosened by the vibration of the vessel in weather of extraordinary severity. The Court said, p. 665:

> "The theory upon which it is insisted that the steamship was unseaworthy is that the rivet in question was defective. Undoubtedly the rivet was not as perfect as the workman might have made it, and was less capable of resisting the effects of strain and vibration than if it had been as absolutely strong and perfect as the best or average of the many thousand rivets in the vessel, but we agree with the district judge who decided the case in the court below that 'any such mere inequality in the strength of the rivets does not amount to unseaworthiness.' * * * It does not follow, because the rivet loosened in consequence of the extraordinary strain which the vessel encountered, that it was one which would have been pronounced insufficient by men of competent judgment, upon an examination and full appreciation of its condition at the beginning of the voyage."

Certainly this is not a decision that there was a defective rivet that was negligible in determining the question of unseaworthiness.

In *Hedley* v. *Pinkney,* a seaman had been drowned after being washed overboard through a space in the starboard bulwarks where stanchions and rails that had been provided had not been put in place. It was claimed that the master was negligent in not having the stanchions and rails fixed before the bad weather

came on and that there was also on a breach of duty by the master to keep the vessel in a seaworthy condition. It was held that the vessel was not unseaworthy because, p. 228,

> "She was in all respect efficiently equipped. The fault was in not making use of the equipment with which she had been furnished. * * * the words 'to keep her in a seaworthy condition for the voyage during the same' point to an obligation of the same character, and not to a neglect properly to use the appliances on board a vessel well equipped and furnished."

The opinion of the House of Lords referred to *Steel* v. *State Line Steamship Company,* 3 App. Cas. 72, where a port hole was insufficiently fastened, but could have been speedily shut if occasion required. Failure to shut it was negligence of the crew and not unseaworthiness of the ship. This is in accord with the decision of the Supreme Court in *The Silvia,* 1898, 171 U. S. 462.

The reference by the Court of Appeals to the foregoing decisions immediately precedes the statement, p. 492:

> "The evidence tends to show that the breaking of the shaft was of little importance with respect to the operation of the vessel, though it is apparent that the defect was not remediable at sea or in a few minutes with the materials available on board."

It seems extraordinary that the breakage of the shaft could be described as "of little importance with respect to the operation of the vessel" when, as shown by the references to the testimony, *supra,* p. 19, the

vessel, after the shaft broke, drifted for two hours down toward the reefs, finally anchored, and being in a dangerous and very exposed position, more than 24 hours later, was towed by a tug to a safer anchorage. The vessel was completely immobilized for two and a half days. It cannot be supposed that she would have remained in that condition if she had been able to proceed. Nor is it reasonable to suppose that the vessel's officers considered the breakdown and consequent delay a minor matter.

SECOND POINT.

CHARTERER HAS BEEN DEPRIVED OF ITS RIGHT TO CANCEL UNDER CLAUSE 14 OF THE CHARTER.

Clause 14 of the charter contains the words:

> " * * * should vessel not have given written notice of readiness on or before December 31st, 1937, but not later than 4 p. m. Charterers or their Agents to have the option of canceling this Charter at any time not later than the day of vessel's readiness."

The facts detailed in the Petition, page 4, and in this brief, *supra,* page 23, show that the owners never gave any notice of readiness on or before December 31 at 4 p. m. On December 29 owners gave notice that the vessel would be ready for delivery on December 31. She was not, however, ready at that time, although she was tendered at 3.30 p. m. and was accepted by charterer through its representative, who was ignorant of the condition of the ship's machinery. Both courts have found that the vessel was unseaworthy at that time. The unseaworthiness which manifested itself

about twenty minutes after tender in the breakage of the shaft of the lubricating oil pump, was not repaired until the early morning of January 3. That was the earliest time when the owners could have tendered a notice of actual readiness. That time overstepped the canceling date by two and a half days. Charterer on that date gave notice of cancelation, which was strictly within the right given in Clause 14.

The Courts below seem to have deprived the charterer of its contract right of cancelation because of the notice of delivery signed in reliance on the owners' warranty of seaworthiness and representation that the vessel was ready.

It is not commercially practicable for a charterer to have a detailed survey made of a vessel, her machinery and equipment at the time that she is tendered under a time charter. Indeed, as the owners stated in their brief in the Court of Appeals, page 10:

> "It may be conceded, however, that no ordinary inspection by the charterer would have disclosed any defect in the shaft of the pump, even assuming that such a defect had then existed."

There can be no doubt that the defect existed as both Courts have found that the vessel was unseaworthy with respect to the shaft at the time of delivery. The result seems to be that a time charterer is obliged to accept a vessel as complying with the owners' warranty of seaworthiness and fitness even though an ordinary examination might not disclose the unseaworthiness.

If this doctrine of law should be accepted, it is not apparent how a charterer could ever protect himself against accepting an unseaworthy vessel unless the unseaworthiness was manifest on tender.

The unseaworthiness here was directly concerned with the shaft of the lubricating oil pump and was not manifest on tender.

If a similar difficulty had existed with respect to the main shaft of the vessel, it certainly could not have been discovered on any ordinary examination of the vessel at sea and could only have been found if the vessel had been put on drydock and her tailshaft drawn. If, in such case, the shaft were found to be unseaworthy, the vessel certainly would not be ready and charterer would be entitled to cancel.

Similarly in this case, if an examination had been made that would have disclosed the defect in the shaft of the lubricating oil pump on December 31, the charterer would not have been obliged to take the vessel, but could have given notice of cancelation immediately. In fact the charterer gave notice of cancelation strictly within the terms of Clause 14, which provided that if the vessel was not ready by 4 p.m. on December 31, charterer could cancel "at any time not later than the day of vessel's readiness."

LAST POINT

WRIT OF CERTIORARI SHOULD BE GRANTED IN ACCORDANCE WITH THE PRAYER OF THE PETITION.

Dated New York, July 25, 1950.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 230

STATES MARINE CORPORATION,

Petitioner,

against

YNGVAR AABY, HELGA LYCHE, ERLING AABY and E. B. AABY'S REDERIAKTIESELSKABET,

Libelants-Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Proceedings Below

Petitioner seeks to review a decision, dated April 12, 1950, of the United States Court of Appeals for the Second Circuit (R. 490), which affirmed the decision of the District Court in favor of libelants-appellees.

This is an Admiralty suit brought in the United States District Court for the Southern District of New York to recover damages in the amount of about $125,000 (R. 8), as a consequence of the petitioner's refusal to perform a 12-months' time charter, dated August 10, 1937, of the s/s *Tento* (Exhibit A attached to the libel and reproduced opposite p. 12).

The libelants are the owners, or the representatives of the owners, of the *Tento;* no question is raised as to their title to maintain the suit (R. 472).

The case was tried in the District Court by Coxe, D. J., and, on July 26, 1948 (R. 470-481), he rendered an opinion in which he directed that a decree be entered for the libelants with a reference to a Commissioner to assess the damages. On January 10, 1949, Judge Coxe signed an interlocutory decree which stated that his findings and conclusions were contained in the above-mentioned opinion (R. 482, 483).

Petitioner's appeal from this interlocutory decree came before Judges Learned Hand, Swan and Chase, and the decision below was unanimously affirmed, opinion by Chase, C. J. (R. 490-497).

Petitioner's petition for a re-hearing (R. 498-511) was denied on May 4, 1950 (R. 512, 513).

The four experienced judges who have passed on this cause have unanimously held that libelants are entitled to recover, and there is no significant difference between the opinion of Judge Coxe, in the District Court, and that of Chase, C. J., in the Court of Appeals. No final decree has yet been entered, and the amount of damages has not yet been fixed.

The question presented is whether the charterer incurs liability when there is an "insubstantial breach" (R. 495) of a 12-months' time charter which, because "the charter market had fallen", the charterer "seized upon * * * to repudiate the entire charter" (R. 471).

The decision rests on the peculiar facts of the case and upon the terms of a charter party now more than 13 years old; it is of no interest to the public generally but only to the parties involved.

A writ of certiorari will be granted "only where there are special and important reasons therefor" (Rule 38, Sec. 5). Subdivision B of Section 5 specifies the class of cases where a writ of certiorari will be granted to review a decision of the Court of Appeals, as where the decision is in

conflict with the decision of another Court of Appeals on the same matter, or where it is in conflict with applicable local decisions, etc.

There is no decision of any other Court of Appeals at variance with the decision now under discussion, nor is there any "conflict with applicable local decisions."

Petitioner lists (petition, pp. 6-13) six reasons why the petition should be granted but they consist merely of unfounded assertions that the decisions below were incorrect.

The case is reported below in 80 F. Supp. 328 (R. 470-481), and in 181 F. (2d) 383 (R. 490-497).

In view of the incorrect statements in the petition, it is necessary to restate the facts.

The Facts

The proceeding was brought for petitioner's failure to perform a contract embodied in a charterparty in writing dated August 10, 1937, whereby the Norwegian Motorship Tento was chartered to petitioner States Marine Corporation for a period of twelve months from the time of delivery which was to be between November 14th and December 31st, 1937, inclusive. She was delivered December 31st, 1937, at which time petitioner instructed its agents to accept delivery if delivered prior 4 P. M. December 31st, dispatching towards St. John, N.B.: **"If** (the vessel) **misses cancelling date and hour would prefer release vessel and would consider ourselves fortunate"** (R. 440). The reason for charterer's preferring to release the vessel was that the charter market had fallen between August 10th and December 31st. This was the finding of the District Judge who had heard the testimony (R. 471). The Tento was delivered on December 31st, 1937, and was ordered by petitioner to proceed toward St. John, N.B. and to communicate by wireless when five days out for orders. Shortly after delivery a small shaft of the lubricating oil pump in the No. 1 auxiliary motor broke (R. 469). This

was found by the District Judge who heard the testimony to be a minor accident (R. 479).

The Tento was a diesel engine twin screw cargo vessel of 4,917 gross tonnage, built at Oslo in 1921 and having the highest class rating in Lloyds during 1937 and 1938 (R. 473). The Tento had five diesel motors on board, two main motors which had nothing to do with the matter and three smaller auxiliary motors (R. 63-64). It was the breakage of the lubricating oil pump shaft on one of these three similar small auxiliary motors that caused the delay seized upon by petitioners to repudiate the charter.

The material clauses of the charterparty are the following (R. 12):

> "THIS CHARTERPARTY made and concluded upon in the City of New York on the 10th day of August 1937, between E. B. AABY, Oslo, Owners of the good Norw. motorship TENTO * * * Classed 100 A-1 at Br. Lloyd's * * * and STATES MARINE CORPORATION, Charterers of the City of New York,
>
> WITNESSETH that the said Owners agree to let and the said Charterers agree to hire the said vessel, from the time of delivery, for about 12 (twelve) calendar months. * * * Vessel on her delivery to be ready to receive cargo with clean swept holds and tight, staunch, strong and in every way fitted for the service * * * on the following conditions:
>
> * * * * * * *
>
> 1. That the Owners shall * * * keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service * * *.
>
> 14. That, if required by charterers, time not to commence before November 14 1937 and should vessel not have given written notice of readiness on or before December 31 1937 but not later than 4 P. M., Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of vessel's readiness.
>
> 15. That in the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull,

machinery or equipment, grounding, detention by average accidents to ship or cargo drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and, if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.

16. * * * The Act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this charterparty, always mutually excepted. * * *

* * * * * * *"

The vessel was classed in Lloyd's (R. 473). She was due for her periodical Lloyd's survey and, for that purpose, was thoroughly overhauled at a shipyard in Sandefjord (R. 129, 473), which had been engaged in the business of building and repairing ships for about 50 years (R. 54, 473). It was a large yard and had an excellent reputation (R. 54, 473). At the same time, engine repairs were made, in consequence of some difficulty with the main engines (not the auxiliaries) on the previous voyage (Hertzberg, R. 63-64, 71). All of this work was done under the supervision of Lloyd's surveyor, Per Bjørn Røli, and of the owner's consulting engineer, Nicolay W. Coch, both of whom have testified (R. 122-136).

The specifications under which the work was done (Exhibit 1 attached to the testimony of Yngvar Aaby), provided:

"15. Lubricating oil pumps to be opened up and cleaned for survey and necessary overhaul as requested by Lloyd's.

To be fitted together again and tested, everything tight and in order."

And see Coch (R. 129, 157).

This work on the lubricating oil pumps was accordingly done, as part of the shipyard's job. Chief Engineer Hertzberg testified (R. 55):

> "Q. Do you know whether the lubricating oil pump of No. 1 auxiliary was opened up? A. Yes.
> Q. Did you see it? A. Yes.
> Q. What condition was it in? A. Good.
> Q. Did you see the shaft which afterwards broke? A. Yes.
> Q. What condition was that in? A. Was good.
> * * * * * *
> Q. In what condition was the shaft as far as your inspection showed? A. Very good."

At pages 68-69 of the record:

> "A. Yes, I saw the shaft.
> Q. What kind of an inspection did you make of it? A. It was opened up and examined for wear.
> Q. What sort of an inspection did you make? A. I also examined it and saw that the various parts inside were in order and that there was no wear. * * *
> Q. How long were you inspecting this shaft that subsequently broke? A. About 5 to 10 minutes, I believe."

Lloyd's surveyor, Per Bjørn Røli, testified that the *Tento* had the highest class in Lloyd's (R. 122); that he was in charge of the survey made on her in December, 1937 (R. 123); that the lubricating oil pump of auxiliary No. 1 was opened up and examined; that the examination included the shaft "which I found in good condition" (R. 123):

> "The shaft was the usual size and the usual material and was in good condition as far as I could observe without making special measurements or making special examination."
>
> "The ship's machinery was tried under working conditions and was found to be in good condition. During the trial of the machinery, the whole of the machinery was found to be in good condition. * * * When the special survey was completed, the machinery was in order" (R. 124).

He gave a certificate (Exhibit A, R. 82) stating that the vessel "is in good condition, in our opinion, eligible to remain as now classed." This certificate states in general terms the scope of the examination and says:

> "All the auxiliary engines, pumps, pumping arrangements, starting air receivers, etc., opened up and examined throughout."

All of the repairs required by Lloyd's surveyor were made (Knudtzon, R. 185-186).

The respondent-libelants' consulting engineer, Nicolay W. Coch, testified, that the vessel was due for a classification survey (R. 129) and that he spent his entire time between December 15th and December 31st, except for 4 days (presumably the Christmas holidays) in inspecting the work (R. 129); that an examination of the pump in question was made "by Lloyd's surveyor and myself" and that the pump was opened up for this examination (R. 130); that the shaft was examined and found to be in order and that it was a proper shaft for the purpose, both in size and in material (R. 131). This pump was

> "opened up, cleaned, overhauled and put together again. We found the pump in good condition" (R. 131).

In his opinion, after this work, the engines, including the auxiliary, were in good order. The pump and shaft were examined and approved also by Lloyd's surveyor (R. 132).

The shipyard people testified to the same effect. Yggeseth was then Assistant Yard Superintendent (R. 105). He testified with respect to the pump:

> "The examination, cleaning and repairing was done with my knowledge and the occasional inspection of Lloyd's inspector" (R. 105-106).

The shaft was examined and found to be in good order (R. 105-106).

Wegger was then the Superintendent of the Yard (R. 113). He testified that he had general supervision of the

work but that the details were not done personally by him (R. 113-114).

Mr. Ford testified (R. 336-337) that the examination thus made was all that was required by good and prudent engineering practice. There is no contradiction of this testimony.

After the shipyard's work on the *Tento* had been finished, the engines and the auxiliaries were tested (Hertzberg (R. 56-57):

> "The engines were tested at full speed while we were lying at Sandefjord repair shops.
>
> Q. How about No. 1 auxiliary? A. Also.
>
> Q. For what period of time? A. About three hours.
>
> Q. What load was on the auxiliary at that time? A. Varying with about 300 amperes.
>
> Q. How does that compare with the load it has in actual service at sea? A. At sea it is about half of it.
>
> Q. During that three hours, did anything develop that was not right with the auxiliary or with the engines? A. Nothing.
>
> Q. Now, on the day that you sailed from Sandefjord, December 31st, was the auxiliary run before sailing? A. Yes.
>
> Q. I mean in addition to the three hours you have spoken of before? A. Yes.
>
> Q. At what time was the auxiliary started on that day—you can look at the log books, if you want to. A. (Referring to log book) Auxiliary motor No. 1 was started at 11 A. M.
>
> Q. And how long did it run? A. For departure—it was used until and during departure."

Departure was at 15 (3 P. M.) (Hertzberg, R. 57):

> "Q. Up to the time when you sailed, did anything go wrong with No. 1 auxiliary? A. No.
>
> Q. At the time when you sailed, so far as you could ascertain were the engines and auxiliaries in good order? A. They were in good order."

The master was present at each test and everything was satisfactory (Knudtzon, R. 192).

The fact, that tests were made is also testified to by Yggeseth (R. 108-109); Røli (R. 124); and Coch (R. 133-134). It was argued by the petitioner that no sea trial was made. It is true that there was no extended sea trial, but the ship ran from the shipyard down to the point of delivery using the No. 1 auxiliary (Hertzberg, R. 57), in addition to the tests of several hours made before sailing.

This pump and shaft had never given trouble before (Hertzberg, R. 55) and none of the witnesses had ever known such a shaft to break (Hertzberg, R. 55; Ford, R. 335, 417). The shaft may reasonably be expected to last for the life of the vessel (Ford, R. 335; Hertzberg, R. 55); and it is testified without contradiction that there was no reason for renewing it or for anticipating trouble with it because of age (Ford, R. 417).

The expert witnesses on both sides agreed that the pump was of proper design (Ford, R. 334; Baruch, R. 355).

Meantime the chartering market had fallen "fifty cents a ton for that type of vessel and the period of the charter" (answer to 10th interrogatory annexed to the libel, R. 18), and the charterer wanted to avoid performing the charter. It is true that the charterer's vice-president protested at the trial that the charterer wanted the vessel (R. 405, 411-412). If it had wanted her, all it had to do was to perform its contract. But that the contrary is the fact is shown by the charterer's reiterated instructions to accept the vessel "outermost place Sandefjord harbor limits provided in time" (R. 405; also first cable in Exhibit 22, R. 432) and the cat was let out of the bag completely by the charterer's cable of December 30, 1937, to its London agent, which forms part of Exhibit 23 and which reads as follows (R. 440):

> "Tento instruct delivery at outermost point Sandefjord harbor outward pilotage only our account accepting vessel if delivers prior four peem 31st despatching towards St. Johns (sic) N B radioing Statemarine New York five days off STJohns (sic)

> for further orders but if misses cancelling date and hour would prefer release vessel and would consider ourselves fortunate."

This shows that the charterer did not in fact want the vessel and that it was looking for an excuse to get out of its obligations under the charter. As the Court said in *Ansgar SS. Co.* v. *Brauer SS. Co.*, 121 Fed. 426, at 428:

> "It is impossible to avoid the conclusion that the vessel was redelivered to the owner rather because of the falling market which rendered the contract a burdensome one to the charterer than on account of any violation of the charter's provisions by the owner."

At or about the time when the repairs were finished, a representative of the charterer, Johan Elligers, made a survey of the vessel (Knudtzon R. 185) and apparently also another representative of the charterer, Mr. Linaae, likewise made inspection (Knudtzon cross-interrogatory R. 193). Elligers testified (R. 325-326) that he did not go down into the engine room but, if he did not, the other charterer's representative evidently did (Hertzberg R. 59). It may be conceded, however, that no ordinary inspection by the charterer would have disclosed any defect in the shaft of the pump, even assuming that such a defect had then existed.

After the inspection, Elligers gave a certificate (Exhibit C attached to the libel; admitted by the answer to interrogatory 3 (a) annexed to the libel, R. 14, 17). This certificate read as follows:

> *"Survey Certificate.*
>
> The undersigned, Mr. Johan Elligers, has to-day together with Captain Knudtzon M/S 'Tento' surveyed the vessel and found all ladders in good condition in holds and on deck.
>
> Cargo battens have been renewed where necessary, and all are now in perfect condition.
>
> Wooden ceilings partly renewed and now in good condition.

The tunnel tops have been examined and found in order without any defects and dents.

There are no defects inside or outside to be found as the vessel has just passed survey at surveyor's satisfaction.

No defects being found at time of delivery.

Sandefjord, 31st December 1937

W. KNUDTZON
Master M/S 'Tento'

JOHAN ELLICERS
Representative of Time Charterers"

The ship then proceeded down the fjord to the point designated by the charterer for delivery, which was as far out as possible. This place was fixed apparently in the hope that the vessel would miss her cancelling date. She was actually delivered at 3:30 P. M. on December 31st, and a certificate of delivery signed by the master and by the charterer's agent was given. This is Exhibit B, annexed to the libel (R. 14) and admitted by the Petitioner's answer to the second interrogatory annexed to the libel (R. 17). The certificate read as follows:

"Certificate of Delivery.

This is to certify that M/S 'Tento' was delivered on time charter at the port of Sandefjord *31st December 1937 3.30 p.m.*

Quantity of Diesel Oil onboard at time of delivery 251.55 tons.

Sandefjord, 31st December 1937.

for Sir William Reardon
Smith & Sons (London) Lim.
as per authority
p.p. Jean B. Linaae

(signature illegible)

W. KNUDTZON
Master M/S 'Tento'"

The charterer then gave the master written orders to

"proceed towards St. Johns" (sic) "N.B. radioing Statmarine New York five days off St. Johns" (sic) "for orders." (Exhibit D annexed to libel, admitted by answer to 6th interrogatory annexed to libel) (R. 15, 17).

The vessel then sailed.

It will be seen that, up to this point, every effort had been made by the owners to deliver the ship in proper condition, and that she had been considered to be in proper condition, not only by the owners and their consulting engineer but also by Lloyd's surveyor, by the shipyard people and by the charterer's representatives, who would have been glad to refuse her if they could have found any excuse for doing so.

Thus the statements that the vessel was broken down at the cancelling time at 4 P. M. as made in page 18 of petitioner's brief, is primarily an attempt to draw the attention of the Court from the obvious fact that at 3.30 P. M. when the vessel was delivered by respondents-libelants and accepted by petitioner without any question being raised of a written notice of readiness, all machinery was in good working order (R. 491).

Under these conditions, the ship was delivered and entered upon the charter. It is submitted that this delivery, made in good faith and after due care, brought the vessel under the terms of the charter from then on, and that the subsequent minor breakdown was governed solely by clauses 15 and 16 of the charter.

The shaft was discovered to have been broken at 4:20 P. M. on December 31st, when the vessel stopped to determine the extent of the damage (R. 491). The ship drifted for two or three hours while the situation was being examined by the engineers (Knudtzon cross-interrogatories 5(a) and 5(d) (R. 194); Kvernes (R. 34)). She then came to anchor at about 7 P. M. and remained at anchor until the following afternoon at 18:30 (6:30 P. M.) (Knudtzon 5th cross-interrogatory R. 194-195; engine log Exhibit 19 (p. 5) (R. 96); deck log Exhibit A attached to Knudtzon's testimony (pp. 2 and 3) R. 203). (The testimony of Kvernes at R. 34-35, that she hove up her anchor at 2 A. M. is obviously an error, in view of the entries in both deck and engine log and of the other testimony. Probably Kvernes had in mind the fact that she sailed from Siggrunn at 2 A. M. on January 3rd.) Meantime, a tug

had been sent for to assist the vessel to port, since she was in a dangerous position near the shore in bad weather conditions, and she started from her anchorage at about 18:30 (Knudtzon cross-interrogatory 5(g) R. 195; deck log, *supra*). She had then been lying at anchor more than 24 hours, and the engines were, of course, cold, with the result that the starting air became exhausted before the engines picked up. But while she was towing in, more air was pumped up and, before the ship reached Siggrunn, which was at about 9 P. M., her engines were going and she actually used them in maneuvering to her anchorage.

The incident is of no importance whatever. It does not show anything wrong with the condition of the engines (Ford R. 419-420). As Mr. Ford said at the trial (R. 418-420), "under cold-climate conditions, it often happens that the engines are hard to start." He suggested as the most probable explanation that the engineers had assumed that they had enough starting air and had therefore failed to pump up any more (R. 419).

The ship anchored at Siggrunn at 21:05 (9:05 P. M.) (Knudtzon R. 187-188) on Saturday, January 1st. On Sunday morning, men from the shipyard came to the *Tento* in a motorboat, took off the pump and carried it back to the shipyard (Hertzberg R. 60-61). It was repaired during the day and was reinstalled that same evening, Sunday, January 2nd (Knudtzon R. 188; Hertzberg R. 62; engine log Exhibit 19, p. 6). It was then tested for about two hours (Hertzberg R. 62; engine log Exhibit 19, R. 96; Knudtzon R. 188) and the ship actually sailed at 2:10 A. M. on Monday, January 3rd (Knudtzon R. 188; Hertzberg R. 62), having lost time from 4:30 P. M. on December 31st to 2:10 A. M. on January 3rd, a period of 2 days, 9 hours and 40 minutes. Only the shaft was renewed. So far as appears, nothing else was done to the pump beyond reassembling it and reinstalling it.

Comment is also made on the fact that the shaft was scrapped. Obviously it is the normal course of a shipyard

to scrap odds and ends of material left over from a job. There was no idea of a lawsuit at the time, and it is certainly quite absurd to suggest that the ship's employees foresaw a lawsuit between the owner and the charterer, which at that time nobody else foresaw, and that therefore they scrapped the shaft in order to destroy incriminating evidence.

Comment is also made on the fact that the shipyard foreman was not called. The libelants' proctors requested information as to the names of the shipyard officials who were familiar with the case. When those names were received all of the men named were examined. There was no suppression of evidence whatever.

See: *Hoskyn* v. *Silver Line Limited,* 63 F. Supp. 452 at p. 457 (S. D. N. Y., 1943), aff'd 143 F. 2d 462, cert. denied 323 U. S. 767.

The petition erects one man of straw after another and finds conspiracies to suppress evidence without the slightest basis.

The foregoing discussion of the breakdown and repair of the pump is designed to make the actual facts clear and to show that every reasonable care which good practice required was used to ensure the good condition of the ship, including this particular pump. While petitioner argues that the question is not one of negligence but of contract; it is believed, nevertheless, important that due care was exercised and that the delivery of the vessel was made in good faith and without fraud or neglect.

The ship had three auxiliary motors and, as it turned out, it would have been possible for her to proceed with the others and to repair at destination. She was, however, within easy reach of the shipyard where repairs had just been made. That fact was one of the reasons for putting back; another was that the engineers (Hertzberg R. 60)

> "were afraid that the auxiliary motor No. 1 was very much damaged on account of being overheated, and if it should be proven that it was necessary to get new

parts, we could then order them there and get the repair shop to assist us with the repairs as they had newly repaired the motor.

Q. Did you know to what port your ship was going to be ordered? A. No.

Q. Did you know what repair facilities you might find at whatever ports you might go to? A. No, absolutely unknown."

It will be remembered that the ship's orders were to apply by wireless for orders five days before she reached St. John. No one knew where she would be sent.

At page 68 of record:

"Q. Isn't it a fact that after your No. 1 auxiliary broke down, you could not go to sea? A. We could go.

Q. Why didn't you go? A. Because we did not know the repair shop facilities in the port that we were going to and here we had a port where they had repaired it and where we could return."

Captain Knudtzon said (R. 195-196):

"When leaving Sandefjord, I had orders to proceed to St. John, New Brunswick. When the shaft broke down, I therefore did not consider it advisable to cross the North Atlantic in mid-winter with a shaft repaired provisionally on board and for this reason put back to Siggrunn in order to have the repair made ashore. If, on the other hand, I had known that we were only to proceed to Falmouth, I would have acted otherwise."

Mr. Ford (R. 337) considered that this decision was a reasonable one.

After the vessel left Siggrunn, she proceeded on her voyage. The charterer suggested (but did not order) that the northern passage be taken (Exhibit 22; R. 433-434). The vessel was in ballast and the master, not knowing where his ship was to be ordered, wanted her bunkers filled, and the charterer's London agent telegraphed him "if coming south and require fuel proceed Falmouth" (Exhibit 22; R. 434; Knudtzon, R. 189; Aaby, R. 141). The vessel accordingly did proceed to Falmouth, and the charterer paid

her inward expenses there (answers to interrogatories 12 and 13 annexed to libel (R. 18-19; Aaby, R. 141)). Both in giving the Falmouth orders and in paying inward disbursements, the respondent was acting as the charterer of the vessel after knowledge of the alleged breach, and its action in these respects was a ratification and reaffirmance of the charter.

In Carver on Carriage by Sea, 8th Ed., p. 279, it is said:

> "And if the charterer, knowing that a condition of the contract is not satisfied, still allows the owner to act upon the charterparty, e.g., by sending his ship to the loading port, he cannot afterwards rely on the breach of that condition as an excuse for not loading her."

No charter hire was ever paid by the respondent (Aaby, R. 138).

While the extraneous facts discussed by appellant at page 23 of its brief may possibly be relevant on the issue of damages, the true situation as to the negotiations is set forth by cable of January 8, 1938 sent to petitioner by its London agent (Exhibit 22; R. 439-440) reading as follows:

"TENTO STILL FALMOUTH TAKING 100 TONS BUNKERS OWNERS ACCOUNT OWNER DESPATCHING HER TOWARDS AZORES STKITTS WIRELESS INSTRUCTIONS EXPECT SAIL SATURDAY

PEEM STOP MR. DOUG SELF VERY FULLY DISCUSSED ALSO CARDIFF OUR STAFF AND IN MR. DOUGS WORDS WITHOUT SLIGHTEST WISH INFLUENCE YOUR DECISION WE ALL HAVE

FEELING SHOULD TAKE SHIP STOP OWNER IS REASONABLE ONLY DESIROUS OF SETTLING DISPUTE AMICABLY STOP WILLING ARBITRATE WHETHER YOU PAY TWO DOLLARS OR

DOLLAR FIFTY ACCORDING WHETHER DELIVERY GOOD OR BAD STOP IS THERE SERIOUS OBJECTION PAYING FULL HIRE TEMPORARILY WHEN AGREED ADJUST LATER ACCORDING ARBITRATION STOP IF YOU LOSE YOU TAKE HER SANDEFJORD AT TWO DOLLARS WHY NOT IF YOU WIN DOLLAR FIFTY THERE HENRY DUE PLYMOUTH 6 PEEM MONDAY CARDIFF

ABOUT NOON TUESDAY STOP REPLY QUICKLY OWNER LEAVING PLEASE EITHER AGREE OR DEFINITELY ADVISE VESSEL IS NOW ENTIRELY OWNERS HANDS STOP MEANTIME OWNER

TRYING FIX BUT NOT CLOSE STOP GUIDANCE OWNERS JUST SPENT £4500 CLASSIFYING ARRANGING GET YOUR REPLY FROM CABLE OFFICE TONIGHT"

Petitioner refused to follow the advice of its experienced London agents and returned the vessel to libelants-respondents (see cable, R. 469).

After the charterer's final refusal to proceed with the performance of the charter, the vessel traded for the next year for her owner's account under various charters, which were offered in evidence (Aaby R. 148-149; Kvernes R. 37). During this time, she operated successfully and without any serious delays (Kvernes R. 37-38; Hertzberg R. 63-64), and her No. 1 auxiliary motor gave no trouble at all.

No one knows why the shaft broke (R. 477). Mr. Ford (R. 336) thought the most likely cause was a latent defect in the metal, such as a slag inclusion. The petitioner's witnesses thought that the breakage was due to metal fatigue. There was a slight suggestion that foreign matter might in some way have got into the pump, but the evidence quoted above shows that the pump was opened and cleaned at the shipyard. The oil tank was also cleaned (Hertzberg R. 61). Therefore, it is not clear how any foreign matter could have got into the pump, and examination after the accident showed no evidence of any such foreign matter (Hertzberg R. 61). Whether the trouble was due to latent defect or to fatigue does not seem very important. It was not discoverable by inspection up to the time the vessel was delivered. This is definitely established by the evidence already referred to.

The conjectures of the petitioner's experts that there *must have been* a visible crack two weeks before the shaft broke do not seem to require much argument. Such a suggestion is obviously highly speculative and is based on no evidence whatever. Mr. Ford expressed a definitely contrary opinion. He said (R. 417):

> "I do not see that that follows at all. Fatigue, when it begins in a shaft, is not visible, and laboratory experiments have demonstrated that the first action that occurs in this accumulative fatigue action is the separation of the metal crystals along their abutting faces occurring in the interior of the metal, and that may

proceed for some time before any crack appears at all. So to say that a crack must be visible two weeks or one week or two days before the break occurs, I do not see that there is any basis for that.

Q. In your opinion might the crack, if there was one, have developed after the ship sailed? A. Yes."

Common experience certainly does not afford any support to the suggestion that there must have been a visible crack two weeks before the shaft broke. On the contrary, a weakness may equally begin in the interior before it shows on the surface, and it certainly is not common experience that a crack is visible a substantial time before metal fractures. The evidence referred to above absolutely negatives the presence of a visible crack, unless the witnesses were committing perjury. The [redacted] experts advance a theory and they seek to establish it by the simple process of rejecting all facts and all evidence which do not support it.

The case, therefore, comes down to this: Every reasonable care was taken to ensure that the vessel was in proper condition and she was accepted by the charterer's agent as satisfactory. The question of law is, therefore, whether, if an ordinary minor breakdown occurs at any later time after delivery, the charterer can repudiate the entire contract.

POINT I

There is no such diversity of authority between the circuits as would warrant the granting of a writ of certiorari.

Petitioners have not cited a single decision however of this Court or of a Circuit Court of Appeals to the effect that a charterer may repudiate a charterparty after delivery when performance of a charterparty is delayed for such a small period of time as not to frustrate the purposes of the charterparty.

This is not a case where the shipowner is attempting to avoid liability inasmuch as the charterparty clearly provides (Paragraph 15, *supra*) for reimbursement to the charterer for the time lost by any breakdown of machinery, together with costs of extra fuel and extra expenses. However, charterer should not be permitted to repudiate a charterparty providing for performance during a period of one year for a two and one-half days' delay as the Court of Appeals' opinion stated:

> "* * * it is clear that repudiation here was not justified: two and one-half days' delay in the course of a twelve months' time charter can hardly be considered so substantial as to frustrate the purpose of the charter * * *" (R. 497-498).

A similar holding by this Court in *Culliford* v. *Gomila,* 128 U. S. 135 (1888) has not been modified in any way.

There an eighteen-day delay in loading a vessel for a voyage from New Orleans to North Europe, was not sufficient to frustrate the charterparty.

POINT II

The breakdown clause in Article 15 of the Charter provides exclusive remedy in cases of accident to machinery.

The Court of Appeals stated (fol. 496):

> "In the midst of this confusion, however, one thing rather clearly appears: that repudiation by a charterer is permissible only where the breach of the owner's undertaking of seaworthiness is so substantial as to defeat or frustrate the commercial purpose of the charter. * * *"

Since the time charterer has no property right in the ship but has only a contract with the owner (*Robins Dry Dock & Repair Co.* v. *Flint,* 275 U. S. 303) it is obviously appro-

priate that the charterer's damages in the event of loss of use of the vessel by accident should be measured by charter hire as the contract provides. In some cases the damages will be lesser than the charter hire and in others greater.

The provisions of Clause 15 are exclusive with respect to all cases where the use of the vessel is lost. The parties have in this clause enumerated a category of casualties not unlikely to occur in the operation of the vessel and have themselves provided what the effect of these casualties shall be upon their respective rights. For loss of time due to breakdown, they have provided that hire shall cease. This is fair to both parties for, when the charter is made, it cannot be foretold whether such a provision will be for the advantage of the owner or of the charterer.

The decisions are clear the breakdown clause affords the exclusive remedy. In *Clyde Commercial SS. Co.* v. *West India SS. Co.*, 169 Fed. 275, the Circuit Court of Appeals for the Second Circuit said (p. 278):

> "This leads us to the conclusion that Article 15 (the off-hire clause) must be understood to state absolute categories in which the parties intended the hire to be suspended, whether the owner was at fault or not * * *."

In the *Ask*, 156 Fed. 678, a time charterer sued for damages to bananas which spoiled owing to the vessel's delay in arriving to load them, in consequence of defective furnaces. It was held that the owner's liability was limited to loss of time under the off-hire clause. Judge Hough said:

> "For such contingencies, the charter-party provides a stipulated measure of damage—i.e., loss of charter-hire—and no other measure is permissible unless a covenant could be found in the contract obliging the vessel to transport the last cargo of the season from Nipe Bay and no other. It is too plain for argument that no such contract was made."

In *Aktieselskabet Stavangeren* v. *Hubbard-Zemurray SS. Co.*, 250 Fed. 67 (C. C. A. 5), a time chartered vessel had just loaded a cargo when, by reason of her engineer's negligence, her stern post was broken. The necessary repairs delayed the ship. The time charterer, who was also the owner of the cargo, sued for damages to the cargo caused by the delay, and also deducted hire. There was an off-hire clause, similar to that in the present charter. The Court held that the charterer was entitled only to a deduction from hire, saying (p. 69):

> "Clause 3 deals specifically with that subject" (owner's liability to the charterer for vessel's loss of time). "It seems that that clause so provided for the case of loss of time from damage, including such as is attributable to negligence of the owner's engineer, preventing the working of the vessel for more than 24 hours at sea, as to make the cessation of hire, until the vessel is again in efficient state to resume her service, the agreed compensation the charterer was to be entitled to for a loss of time so occasioned, and that the appellee (charterer), having received the benefit of a compliance with that provision, was not entitled to anything more because of loss of time so caused."

In *The Bjornefjord*, 271 Fed. 682 (C. C. A. 2), the same accident was involved as that passed on by the Supreme Court in *Robins Dry Dock & Repair Co.* v. *Flint, supra.* The propeller was cracked and, while replacing it, the shipyard's employees negligently dropped it and did damage which caused substantial further delay. The time charterer sued the shipowner. The owner set up, among other defenses, the provisions of the off-hire clause. The Court held that the charterer's sole remedy was the deduction of hire and that it was not entitled to recover the estimated value of the steamer's use during the period of detention. The Court said (p. 683):

> "Judge Learned Hand dismissed the libel on the ground that the delay was caused either by a 'break-

> down of machinery', within article 16, or by 'an accident of machinery,' within article 17, which article in either case *completely* defined the charter's remedy, viz., to be relieved from payment of hire 'until the steamer was again in an efficient state to resume her service.'" (Italics ours.)

So in the *Toledo*, 30 Fed. Supp. 93, 1939 A. M. C. 1300, where a crankshaft web broke from latent defect within a few days after delivery, the District Court held that the charterer "could not recover anything in addition to the adjustment of hire and bunkers" and spoke of the breakdown clause as "the stipulated and exclusive measure of damage". The Circuit Court of Appeals for the Second Circuit affirmed (122 F. (2d) 255, 1941 A. M. C. 1219).

In the *Essex Envoy*, 35 Com. Cas. 61, the Court held that the breakdown clause applies even to a case where the accident occurred before delivery and where the repairs were made after delivery. The Court said (p. 65):

> "Mr. Stenham says that it must be damage that occurs after the vessel goes on hire. The clause does not say so and one can well imagine many cases where damage which had occurred before the vessel comes on hire may not be discovered or may not be repaired until after the vessel comes on hire and, if so, the parties by the terms of the clause seem to me to have provided for such a matter. As a matter of business, I should think that this happens quite constantly and the words are simple enough to cover such a case and I do not see any reason why I should confine it to damage previously received."

In this case, the damage had been done by a collision before delivery and, obviously, therefore, the ship was not seaworthy at delivery.

POINT III

Petitioner's contention ignores Clause 16 of the charterparty which contains a mutual exception of "all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation".

That the fracture of the shaft was an accident to machinery is obvious (the *Miranda,* L. R. 3 A. & E. 561; cf. *Mercantile SS. Co.* v. *Tyser,* 7 Q. B. D. 73). The clause provides that such an accident is "always" excepted "throughout this charterparty."

The charterparty is a document. The clause specifically provides that, throughout the provisions of that document, accidents to machinery are excepted. Every provision of the charter is subject to this exception, including the provision that the ship shall be tight, staunch, strong, etc.

In *Clyde Commercial SS. Co.* v. *West India SS. Co.,* 169 Fed. 275, the Circuit Court of Appeals (p. 277) construed a similar provision to relieve each party from liability to the other in case performance were prevented by an excepted clause.

In the *G. R. Crowe,* 294 Fed. 506 (affirming 287 Fed. 426), the Circuit Court of Appeals for this circuit stated that Article 16 of the charter there in question (which provided that "the steamer is not accountable for leakage") was a "modification of or an exception to the warranty of seaworthiness," and that the ship was not liable, even though, as the Court found, the damage was due to the fact that she was not seaworthy. See, too, the *Fri,* 154 Fed. 333. The *G. R. Crowe* was approved by the Circuit Court of Appeals (2nd Circuit) in *Societa Anonima, etc.* v. *Federal Ins. Co.,* 62 F. (2d) 769, at 771, 772.

The exception applies at any stage of the performance of the charter. In Carver on Carriage by Sea, 8th Ed., Sec. 148, it is said:

> "When and where such perils are to be 'always excepted,' the shipowner seems to be relieved from lia-

> bility for any failure to perform his contract, if caused by those perils whenever they may have occurred."

Obviously, since the exceptions apply "always" throughout this "charterparty," they apply to all parts of the charter (*Barker* v. *McAndrew,* 18 C. B. [N. S.] 759), including the agreement that the ship shall be seaworthy; and, since the contract here was one of private carriage, not of common carriage, there is no ground upon which such a provision could be held invalid. See Ward, J., in the *G. R. Crowe,* 287 Fed. 426 at 427; *Blackburn* v. *Liverpool, etc., Nav. Co.,* 1902, 1 K. B. 290; *Standard Oil Co.* v. *U. S.,* 264 Fed. 66 (C. C. A. 4).

The charter does not impose on the owner liability for such accidents (beyond loss of hire during the delay), though, of course, the owner must repair the damages, in accordance with the maintenance clause, which is inserted

> "merely for the purpose of laying upon the owners the burden and the expense of maintaining the vessel during the period of hire in a thoroughly efficient state, including, of course, expense of all necessary and proper repairs" (*Giertsen* v. *Turnbull,* 1908 Sess. Cas. 1101).

This was approved and quoted by the English Court of Appeal in *Tynedale Shipping Co.* v. *Anglo-Soviet Shipping Co.,* 41 Com. Cas. 206. The Court there pointed out further that the maintenance clause does not

> "constitute an absolute engagement or warranty that the shipowners will succeed in so maintaining her whatever perils or causes may intervene to cause her to be inefficient for the purpose of her services. On the contrary, there is a very wide exception clause * * *: The engagement of the shipowners is this, that if accident happen, or events arise to cause the ship to be inefficient * * * they will take all reasonable and proper steps that reasonable men could to put them right again."

POINT IV

Petitioner could not cancel after delivery.

The *Tento* was in fact delivered to petitioner and ordered to proceed to St. John, N.B. (R. 491, 278). Petitioner's brief cites no authorities to the contrary to the Circuit Court's finding (R. 498): "* * * the delay occurred after delivery and acceptance of the vessel and not before." Of course, as the Court stated, a breakdown occurring a month later would not have justified cancellation and it appears to be of little importance that the breakdown occurred only an hour after delivery. In this respect, as stated by the Circuit Court of Appeals for the Second Circuit:

The cancelling clause, on which the petitioner relies, provides that, if the vessel is not ready

> "on or before December 31st, 1937, but not later than 4 P. M., charterers or their agents to have the option of cancelling this charter at any time not later than the day of vessel's readiness."

This right of cancellation was limited in time, and that limitation had expired when this accident occurred and the right of cancellation had expired with it. This clause likewise shows that the scheme of the charter is that the option to cancel the charter does not persist beyond the time of delivery and that the rights of the parties thereafter are governed by the other terms of the charterparty. In *Jones* v. *Barnes-Ames Company,* 244 Fed. 116, a charterer refused to accept the vessel because of a smell of paint in the holds. The charter provided that the charterer might cancel if the vessel were not ready to receive cargo on or before April 20th, but also provided:

> "This option to cancel shall be exercised not later than the presentation of said surveyor's pass of readiness."

The charterer attempted to cancel on the following day. The Court said (p. 121):

> "The option to cancel was made a matter of contract and it could be exercised only by strict compliance with the terms on which it was given. Time was of the essence of the agreement. Inasmuch as the respondent did not exercise its option to cancel within the time allowed it by the terms of the charterparty, it was not allowable for it to exercise it thereafter; for once a charterer lets the cancelling date mentioned in the charter go by, he waives the right which the charter gives him to cancel and abandons his right to cancel it if the vessel is not ready to load by the day specified. Readiness to load includes fitness to receive cargo. And, as the notice of cancellation was given after the time for giving it had expired, it was without effect."

Charterparties are prepared by practical men to serve practical purposes. It would obviously be most inconvenient, because leading to the greatest uncertainty, if the cancelling clause should survive the acceptance of the vessel by the charterer. It is for that reason that this well-known form of charterparty (Time Charter approved by the New York Produce Exchange) provided that the option of cancellation must be exercised "not later than the day of vessel's readiness." This is a familiar provision in charterparties, as shown by the decision in *Jones* v. *Barnes-Ames Co., supra.* Business reasons require a prompt decision, if the charter is not to be binding, and the charterer's right of rejection under the cancelling clause is consequently limited in time. Of course, if the vessel sustains, or has sustained, such serious damage as to result in a frustration (which was clearly not the case in the present instance, 1439), other principles may apply, as indicated *infra,* pp. 27-29.

POINT V

A charterparty may be repudiated after a vessel has been delivered only when breach thereof is such as to frustrate its purposes.

English and American authorities are in agreement that once a vessel has been delivered a charterparty may be repudiated only in the event conditions are discovered such as would frustrate the purposes.

In Scrutton on Charterparties, 14th Edition, p. 99, it is said:

> "Such breaches of these undertakings as defeat the commercial purpose of the voyage will justify the hirer of the ship or the owner of the goods carried in repudiating the contract to carry. Such breaches as do not defeat the commercial purpose of the voyage will give rise to an action for damages."

This follows the general principle stated by Lord Ellenborough in *Davidson* v. *Gwynne,* 12 East 381, 389, as follows:

> "The principle laid down in Boone v. Eyre has been recognized in all the subsequent cases, that unless the non-performance alleged in the breach of contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent but as a distinct covenant for the breach of which the party injured may be compensated in damages."

The same principle was stated by the Circuit Court of Appeals for the Fourth Circuit in *Ainesworth Coal & Iron Co.* v. *Grangesberg Oxelosund,* 287 Fed. 291, at 295:

> "The learned judge of the lower court aptly stated the law applicable to this condition, as laid down by Lord Mansfield, as follows:

> 'Where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other; but when they go only to a part where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent.' Boone v. Eyre, 1 H. Bl. 273."

A similar principle was laid down in *MacAndrew* v. *Chapple,* L. R. 1, C. P. 643, at 648, per Willes, J., as follows:

> "* * * and it is also settled, at any rate in this court, that a delay or deviation which, as it has been said, goes to the root of the whole matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading the cargo; but that loss, delay or deviation short of that gives an action for damages, but does not defeat the charter."

Thus, where it is found that the breach does not frustrate the purpose of the charter, it is held that the charterer must load, without prejudice, of course, to his right to recover any damage which he sustained by the owner's breach (*Tarrabochia* v. *Hickie,* 1 H. & N. 183).

The same rule was stated in *Hildebrand* v. *Geneva Mill Company,* 32 F. (2d) 343, at 348, as follows:

> "In order to justify the rescission of a charterparty, the character of the breach must be such as to defeat the purpose of the contract; otherwise recovery is confined to damages sustained."

A similar principle in the case of sale by installment was stated in the case of *Helgar Corporation* v. *Warners Features,* 222 N. Y. 449, as follows:

> "General statements abound that at law time is always of the essence (citing authorities). For some purposes this is still true. The vendor who fails to

receive payment of an installment the very day that it is due may sue at once for the price. But it does not follow that he may be equally precipitate in his election to declare the contract at an end (citing authorities). That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties."

A mistake as to a minor matter, compensation for which is provided for by the terms of the contract itself, does not authorize a rescission.

Knutson v. *Metallic Slab Form Co.*, 128 F. (2d) 408, 411 (C. C. A. 5).
Arrow Petroleum Co. v. *Johnston*, 162 F. (2d) 269-276 (C. C. A. 7).

If, however, the owner's breach is such as to frustrate the purposes of the contract, the charterer may refuse performance (*Stanton* v. *Richardson*, L. R. 7 C. P. 421, affirmed L. R. 9 C. P. 390). There it was held that, since a vessel could not be made fit for the proposed cargo within such a time as would not have frustrated the object of his venture, the charterer was justified in not loading. Another example is *Snia Societa, etc.* v. *Suzuki & Co.*, 29 Com. Cas. 284, where, after several weeks under the charter, it proved that the propeller blades were not strong enough and that they could not be made efficient within a reasonable time. The charterer was held entitled to refuse to go on.

On general principles of law, therefore, minor breaches on the part of the owner give rise only to a claim for damages and do not warrant repudiation. Under the charter-party in suit, the parties agreed by clause 15 that minor breaches not amounting to frustration should be dealt with by putting the vessel off hire.

POINT VI

Petitioner's authorities support a claim for damages, not repudiation.

In general petitioner ignores the business history of the dispute and skips over instructions given to its Norwegian agents to cancel the charterparty prior to delivery. Their obvious interest in escaping from the obligations of the charterparty is shown by the wording of their cable, "If misses cancelling date and hour would prefer release vessel and would consider ourselves fortunate" (R. 440), as well as advices of their experienced London correspondents to the effect that they "all have feeling should take ship" (R. 439). Specific instances of petitioner's incorrect statements and contentions are enumerated below:

(1) At page 2 of the petition petitioner attempts to magnify the extent of the casualty and states that shortly after the *Tento* had been delivered and accepted by the charterer, "the shaft of the lubricating oil pump broke", and, on page 6, refers to a "defective shaft" which "demobilized the vessel for two and one-half days while repairs were being made on shore." Neither the petition nor the brief point out, as they should have done, that this small shaft, about 10 inches long and 1⅛ inches in diameter, was only that of the lubricating oil pump of No. 1 auxiliary motor (R. 470). The two main engines (diesels) were not affected and the ship had two other auxiliary engines, three in all. Only one auxiliary needed to be in operation while the ship was at sea and the engines were stopped and the ship later returned to a Norwegian repair yard merely because of the fact that the auxiliary could be more easily replaced in Norwegian yards than elsewhere (R. 60). The ship could have proceeded on her voyage making use of another auxiliary (R. 60).

(2) At pages 3 and 10 of the petition, and on page 17 of the petitioner's brief it is claimed that the master should have required a trial trip at sea before tendering the vessel.

This overlooks the fact that there was no such requirement in the charter, that Lloyd's surveyor had certified the vessel as in good condition (R. 473), that petitioner's surveyor had certified that "there are no defects inside or outside"(R. 475), and that there was a dock trial of the ship's machinery, including auxiliary No. 1, which was tested for a three-hour period under a load double the ordinary load at sea, without any trouble developing (R. 56, f. 168). Also, auxiliary No. 1 was started at 11 A. M. on December 31st (R. 57) and the *Tento* then proceeded to the outermost point of Sandefjord Harbor for the purpose of making delivery, still without any difficulty.

Page 9 of the petition reads:

> "This ruling" (the decision below) "is a direct invitation to any unscrupulous shipowner to palm off an unseaworthy ship on an innocent charterer."

The above argument is not based on any of the findings in the case at bar. There is a complete absence of any findings of lack of due care or of any impropriety of any kind on the part of the respondents.

(3) Petitioner (Petitioner's Brief, p. 11) states:

> "No notice of actual readiness ever was given."

The above is most misleading.

Respondents notified petitioner in writing that the vessel would be ready for delivery on December 31st (R. 474), and petitioner instructed its representative "to take delivery on time charter" at "outermost point Sandefjord Harbor" (R. 474).

After survey of the *Tento* by a surveyor appointed by the charterers, who stated that there were "no defects inside or outside" (R. 475, 432), the charterers' representa-

tive signed a "Certificate of Delivery" to certify that the *Tento* "was delivered on time charter" at Sandefjord on December 31st (R. 278, 475).

Petitioner then gave the master written orders to proceed towards St. John (R. 475) and the ship sailed.

On January 3rd, after the delay had occurred, petitioner instructed the master either to

> "make Northern passage or, if going South and require fuel, proceed Falmouth, which latter the master did" (R. 476, 477, 434).

This clearly recognized the charterparty as in effect. As stated by the District Court (R. 478):

> "the vessel was delivered to and accepted by the respondent" (now petitioner) "prior to the cancelling date and thereupon started performance of the charter. The vessel was thus brought under the charter. * * *"

The formalities in giving notice of readiness could, of course, be waived by the charterers, and waiver in this case took place as shown by the findings of the Courts below.

The Driebergen, 60 F. (2d) 367, C. C. A. 5.

See, too:

Bentsen v. *Taylor,* 1893, 2 Q. B. 274.

(4) At pages 11 and 12 petitioner claims that the Court of Appeals held that the owner "does not have to fulfill its absolute warranty," and that this is a "brand new legal doctrine." Neither the Court of Appeals nor the District Court made such holding as is asserted by petitioner. The decision was that, if there was "an insubstantial breach" of charter (R. 495), the charterer was not entitled to repudiate the entire charter but would be left to assert his claim for damages, if any, against the owner. In so deciding the Courts below are supported by all of the authorities.

In Scrutton on Charterparties, 15th Edition, Article 28, speaking of the owner's undertaking that his ship is seaworthy, the text reads (p. 92):

> "Such breaches of these undertakings as defeat the commercial purpose of the voyage will justify the charterer of the ship or the owner of the goods carried in repudiating the contract to carry. Such breaches as do not defeat the commercial purpose of the voyage will give rise to an action for damages."

The text cites *Clipsham* v. *Vertue,* 5 Q. B. 265; *Tarrabochia* v. *Hickie,* 1 H. & N. 183 (see *infra,* p. 35), and *MacAndrew* v. *Chapple,* L. R. 1 C. P. 643.

Petitioner states (Brief, p. 34) that American decisions should conform to well-settled English law. It was therefore proper for the District Court and the Court of Appeals to follow the above well-settled English rule.

(5) Petitioner also states that the opinion of the Court of Appeals is confusing and that the affirmance was on a different ground from that relied on by the District Court.

An examination of the opinion of the Court of Appeals shows that the facts are first stated together with comment on the opinion below (R. 490-492).

At pages 493 and 494 the Court of Appeals discusses the meaning of the word "warranty" as used in various decisions.

The Court of Appeals next stated (p. 495):

> "One thing rather clearly appears: that repudiation by a charterer is permissible only where the breach of the owner's undertaking of seaworthiness is so substantial as to defeat or frustrate the commercial purpose of the charter."

Many authorities are cited in support of the above, and, as the breach was plainly "insubstantial," the decision below was affirmed.

Judge Coxe, in the District Court, expressed the same view as did the Court of Appeals (R. 480), and further held that, in view of the specific language of the charter, the petitioner's remedy was provided for by Clause 15 (R. 479). It was unnecessary for the Court of Appeals to express any view as to this second ground of decision (see R. 491).

(6) Discussion of some cases cited by petitioner.

In *Davison* v. *Von Lingen,* 113 U. S. 40 (1884), cited by petitioner, pages 7, 9, 26, 29, a charterparty of a steamer had been signed on August 1st for the carriage of a cargo of grain from Philadelphia or Baltimore to a safe port in the United Kingdom or Continent as ordered. The charterparty stated that the steamer either had "now sailed" or was "about to sail from Benizaf with cargo." In actual fact the steamer, on August 1st, was at Benizaf, only three-elevenths loaded, and did not sail until late on August 7th.

Prior to signing of the charter, a discussion had taken place between the representatives of the shipowner and the charterer, in which it was made clear to the shipowner that prompt arrival was essential, as it was necessary to load the cargo in August, which would, of course, not be possible if the ship did not sail from Benizaf until August 7th (113 U. S. p. 46). Owner's representatives sought to have the charter read:

> "Sailed from, or loading at Benizaf,"

but the charterers refused to agree.

The steamer could not be tendered to charterers until September 11th (113 U. S. p. 47), about two weeks later than her expected date, and the charterers refused to accept her on the ground that, when the charter was signed, she had neither sailed nor was about to sail from Benizaf.

The Court held that the charterparty implied that the vessel had already been loaded on August 1st (113 U. S.

p. 49), and that, in view of the prior negotiations and the situation of the parties, the case fell within a class of cases where the breach of a warranty was not "insubstantial," and that it was

> "not within the class illustrated by *Tarrabochia* v. *Hickie,* 1 H. & N. 183; *Dimech* v. *Corlett,* 12 Moore P. C. 199, and *Clipsham* v. *Vertue,* 5 Q. B. 265" (113 U. S. p. 50).

In *Tarrabochia* v. *Hickie* (1856), *supra,* evidently approved by the Court, a charterparty was entered into which provided that the ship, then at Fiume, being "tight, staunch and strong and in every way fitted for the voyage," should proceed to Cardiff and there load for Mediterranean ports.

At the trial it appeared that the vessel was delayed in arriving at the loading port by reason of her unseaworthiness, and the charterer therefore refused to load her. The jury found that the vessel was not "tight, staunch and strong," but that the object of the voyage was not frustrated. The Court held that the shipowner was entitled to recover. Pollack, C. B., said, p. 186:

> "The first plea alleges that the vessel was not tight, staunch, or strong, and that by 'reason thereof the object of the charterparty and of the voyage was wholly frustrated.' The latter is a material allegation, and the jury have found it in the negative. The question then is, whether the fact of the vessel not being tight, staunch or strong, is a condition precedent to the performance by the defendant of his contract. I think not."

Bramwell, B., and Martin, B., concurred.

Davison v. *Von Lingen, supra,* is entirely different from the case at bar in many substantial respects:

1. The charter was for the carriage of only one cargo from U. S. Atlantic to Northern Europe, not more than one month's employment. A time charterparty for "12 calendar months," which does not contemplate the car-

riage of any specific cargo, obviously differs essentially from a single trip charter for the carriage of grain.

2. The fact that the ship must be loaded and ready to sail on August 1st was emphasized in the discussions which took place when the charter was signed.

3. The delay much exceeded that involved in the case at bar.

In *New York & Cuba Mail Co.* v. *Eriksen,* 27 Comm. Cas. 330 (1922), cited by petitioner, pages 10, 32, 34, a steamer had been chartered to load grain and oil-cake at Buenos Aires. She reached her loading place on November 25, 1920, and the master gave notice of readiness to load at 4 P. M.

At that time there were twenty-four boiler tubes in each of the steamer's boilers, which required renewing and this work could not be completed for at least ten days. Until this work had been completed and the boilers tested a certificate of seaworthiness could not be obtained.

The charterers refused to load the ship under the charter-party and gave notice of cancellation immediately the ship was tendered pursuant to the cancelling clause, which stated that, if the vessel should not be ready to load by 6 P. M. on November 25, 1920, charterers had the option of cancellation.

The Court held that the charterer was entitled to give notice of cancellation under the cancelling clause in view of the serious condition of disrepair existing at 4 P. M. on November 25th, when the notice of readiness was given. The Court also pointed out that the repairs on the boilers actually took about fifteen days (27 Comm. Cas. 337).

The above case is obviously entirely different from the case at bar because there the charterer gave seasonable notice of cancellation, as provided for in the cancellation clause, the ship being at the time of the notice plainly and seriously unseaworthy. The ship was never accepted and

ordered to proceed as in the case at bar; also, the period of delay was much longer and the charter voyage was for the carriage of a single cargo from the Argentine to Europe, and was not of twelve months' duration as in the case at bar.

In *Ronalds* v. *Leiter,* 109 Fed. 905 (1901), cited by petitioner, page 31, a yacht had been chartered for two months from November 9, 1896, for $3,000 paid in advance, under an informal form of charter. On December 20th, while en route to Tampico, the starboard propeller broke off close to the hull and the starboard propeller fell into the sea, knocking a hole in the hull and causing a serious leak. The yacht reached Tampico using her port engine and propeller. At Tampico the hull was temporarily repaired and, on January 7th, the yacht left Tampico in tow, reaching Galveston on January 10th. On the next day the charterer left the yacht, the two months' period of the charter having then expired.

After arrival at Galveston, permanent repairs were undertaken and the yacht then proceeded to New York, at which port she was to be redelivered on termination of the charter, reaching New York on February 27th.

The jury found that the yacht was initially unseaworthy; nevertheless the charterer was charged for the use of the vessel at charter rates until her delivery to the owner in New York, less an allowance for towage from Galveston to New York.

Ronalds v. *Leiter, supra,* differs entirely from the case at bar in that the serious breakdown of the yacht under a two-months' charter for a pleasure cruise was not remedied for a period of about thirty-nine days. The charterer lost the contemplated use of the yacht from December 20th, and her return to New York was only for the owner's convenience and benefit and in accordance with his demand. Even under those circumstances the charterer was held liable for charter-hire up to the date of the yacht's arrival at New York on February 27, 1897.

Discussion of other cases cited by petitioner would be inappropriate.

LAST POINT

The petition for a writ of certiorari should be denied.

Dated, New York, August 28, 1950.

Respectfully submitted,

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